(2)

No. 01-1014

Supreme Court, U.S.
FILED
FEB 11 2002
CLERK

In The Supreme Court of the United States

RICHARD M. STUMBO,

Petitioner,

v.

DYNCORP PROCUREMENT SYSTEMS, INCORPORATED, f/k/a DynCorp Aerospace Operations, Incorporated; DYNCORP AEROSPACE OPERATIONS, INCORPORATED; DYNCORP AEROSPACE OPERATIONS, (U.K.), LIMITED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief in Opposition

Michelle Bodley Radcliffe
Counsel of Record
Steven W. Ray
Edward Lee Isler
RAY & ISLER, P.C.
8245 Boone Boulevard, Suite 402
Vienna, Virginia 22182
(703) 748-2690

Counsel for Respondents

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

6187

RESPONDENTS' COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Where this Court has determined that an individual whose hypertension is controlled by medication and who is not limited in any major life activity is not "disabled" under § 12102(2)(A) of the Americans with Disabilities Act ("the Act"), *e.g.*, *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521 (1999), and where the district court and the Fourth Circuit, applying the legal analysis adopted in *Murphy*, made factual findings, based upon Petitioner's admissions, that Petitioner's hypertension is fully controlled by medication and does not substantially limit him in any major life activity, should this Court review the lower court's determination that Petitioner cannot recover under § 12102(2)(A) as a matter of law because he was not "disabled" as defined therein?

2. Is review by this Court warranted where, following this Court's decisions in *Murphy* and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the district court and the Fourth Circuit required Petition to present facts that Respondents "regarded" him to be "precluded from a broad range of jobs", *Murphy*, 527 U.S. at 523, *accord Sutton*, 527 U.S. at 492, and determined that, since that Petitioner's proof established only that Respondents considered him unable to perform the singular position of International Police Officer in Bosnia, Petitioner could not sub his claim under § 12102(2)(C) that Respondents regarded him as substantially limited in the major life activity of working?

LIST OF PARTIES

The following are parties to the proceedings in which the United States Court of Appeals for the Fourth Circuit issued the judgment that is under review:

Richard M. Stumbo -
Plaintiff/Appellant/Petitioner

DynCorp Procurement Systems, Inc. -
Defendant/Appellant/Respondent

DynCorp Aerospace Operations, Inc. -
Defendant/Appellant/Respondent

DynCorp Aerospace Operations (U.K.), Inc. -
Defendant/Appellant/Respondent

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents make the following disclosures:

DynCorp Procurement Systems, Inc.

DynCorp Procurement Systems, Inc., has a parent corporation, DynCorp Information and Engineering Technology, and a grandparent corporation, DynCorp. Neither DynCorp Procurement Systems, Inc.'s parent or its grandparent are policy held companies owning 10% or more of DynCorp Procurement Systems, Inc.'s stock.

DynCorp Aerospace Operations, Inc.

DynCorp Aerospace Operations, Inc., has a parent corporation, DynCorp Technical Services, Inc., and a grandparent corporation, DynCorp. Neither DynCorp Aerospace Operations, Inc.'s parent or its grandparent are policy held companies owning 10% or more of DynCorp Aerospace Operations, Inc.'s stock.

DynCorp Aerospace, Operations (UK) Ltd.

DynCorp Aerospace Operations (U.K.), Inc., has a parent corporation, DynCorp Aerospace Operations, Inc., a grandparent corporation, DynCorp Technical Services, Inc., and a great-grandparent, DynCorp. Neither DynCorp Aerospace Operations (U.K.), Inc.'s parent, grandparent or great-grandparent are policy held companies owning 10% or more of DynCorp Aerospace Operations (U.K.), Inc.'s stock.

TABLE OF CONTENTS

Page

RESPONDENTS' COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS ENTERED BELOW 1

JURISDICTION STATEMENT 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE FACTS 2

1. The Parties 2

2. Petitioner's Hypertension 3

3. DynCorp's Contract To Provide International Police Monitors In Bosnia 3

4. Petitioner's Application For IPM In Bosnia 4

5. DynCorp's Review Of Petitioner's Application 5

6. DynCorp's Invitations To Petitioner To Apply For Other Similar Positions 7

ARGUMENT 7

1. Certiorari Is Not Warranted On Petitioner's Claim Under § 12102(2)(A) Of The ADA Because This Court Has Already Addressed The Very Legal And Factual Issues Presented 8

2. Petitioner's Assertion That The Position Of International Police Monitor Is A "Class of Jobs" Contravenes The Applicable Legal Standard Identified By This Court In *Sutton* and *Murphy* 12

CONCLUSION 19

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

Bragdon v. Abbott,
524 U.S. 624 (1998) 8

Branti v. Finkel,
445 U.S. 507 (1980) 12

Bridges v. City of Bossier,
92 F.3d 329 (5th Cir. 1996) 14

Coleman v. Southern Pacific Transportation Co.,
997 F. Supp. 1197 (D. Ariz. 1998) 14

Hooven-Lewis v. Caldera,
249 F.3d 259 (4th Cir. 2001) 18

Murphy v. United Parcel Service, Inc.,
527 U.S. 516 (1999) ..... *passim*

Sutton v. United Airlines,
527 U.S. 471 (1999) ..... *passim*

Toyota Motor Mfg., Kentucky, Inc. v. Williams,
122 S. Ct. 681 (2002) 8

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 12101, *et seq.* 1

42 U.S.C. § 12102(2) 1

42 U.S.C. § 12102(2)(A) ..... i, 7, 8, 10

42 U.S.C. § 12102(2)(C) ..... i, 12

Regulations:

29 C.F.R. § 1630.2(j) 1

29 C.F.R. § 1630.2(j)(3)(i) 13

29 C.F.R. § 1630.2(j)(3)(ii)(B) 16

OPINIONS AND ORDERS ENTERED BELOW

The United States District Court for the Western District of Virginia granted summary judgment in Respondents' favor on all counts of Petitioner's Complaint in an opinion dated January 29, 2001 and published at 130 F. Supp.2d 771. The district court's opinion is reproduced in full in the Appendix to the Petition for Writ of Certiorari at App. 5.

The United States Court of Appeals for the Fourth Circuit issued an unpublished per curiam opinion dated September 5, 2001, affirming the decision of district court. The appellate court's opinion is reproduced in full in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1.

JURISDICTION STATEMENT

The judgment of the court of appeals was entered on September 5, 2001. The Petition for Writ of Certiorari was filed on December 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Petitioner's claims arise under the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. § 12101, *et seq.* The statute at issue in this appeal is § 12102(2), which is set forth in full in the Petition for Writ of Certiorari at 1-2. The federal regulation related to Petitioner's claims is 29 C.F.R.§ 1630.2(j), also set forth in the Petition for Writ of Certiorari at 2-3.

STATEMENT OF THE FACTS

Petitioner's Statement of the Facts and Argument are replete with assertions that misrepresent the facts in the record and assertions that have no foundation in the record. Accordingly, Respondents' Statement of the Facts and Argument correct and supplement the Petitioner's unsupported representations with record facts (and, where necessary, citations to particular pages of the Joint Appendix filed with the Fourth Circuit as reproduced in the Appendix hereto) where such misrepresentations may have a bearing on what issues would properly be before the Court if certiorari were granted.

1. The Parties

Since his retirement from the Metropolitan D.C. police force in 1990, after 21 years of service, Petitioner has been employed in several domestic and international security and/or investigative positions that have required him to be on his feet most of the time, and that have sometimes required 8-16 hours of work per day for one to three months with no days off. Since 1997, Petitioner has worked for W.M. Kellogg Co. as a security coordinator in Algeria. In this position, Petitioner works primarily on his feet for fourteen hours a day, seven days a week, for two months at a time providing security measures for employees working on a natural gas renovation project.

Respondent DynCorp Aerospace Operations (U.K.), Ltd. ("DAOL") is incorporated under the laws of the United Kingdom. DAOL employs persons hired as International Police Monitors ("IPMs") under a contract between DynCorp Aerospace Operations,

Inc. and the U.S. State Department. DynCorp Aerospace Operations, Inc. recruited persons to serve as IPMs in Bosnia. Respondents shall hereafter be referred to as "DynCorp."

2. Petitioner's Hypertension

In or around 1991, Petitioner was diagnosed with high blood pressure, otherwise known as hypertension. His hypertension "has been treated with medication without incident." Appendix to the Opposition (Opp. App.) 11. Petitioner admitted during discovery that he has had no physical limitations as a result of his high blood pressure. Opp. App. 7-9, 11.

3. DynCorp's Contract To Provide International Police Monitors In Bosnia

Under its contract with the State Department, DynCorp provided highly qualified law enforcement personnel to work in Bosnia as part of the United Nations International Police Task Force ("IPTF"). IPTF personnel were responsible for reconstituting, establishing and maintaining the rule of law and gaining public confidence in areas where the civilian police force was not fully functional during the Bosnian conflict. Their duties included, *inter alia*, monitoring and evaluating law enforcement activities, conducting on-the-job training for law enforcement personnel, assessing threats to public order and advising how to deal with such threats, and assisting in normal daily law enforcement activities.

Although DynCorp recruited the IPMs, once they reported to Bosnia they were subject to the direction of the United Nations. The United Nations,

not DynCorp, determined both the geographic location to which an IPM would be assigned and the duties he or she was to perform. Moreover, IPMs in Bosnia were charged with finding their own housing. In 1996, living conditions throughout Bosnia were unpredictable and often strenuous. The terrain was mountainous, obtaining transportation was difficult, the availability of running water, refrigeration and electricity was erratic, and food supplies were limited.

4. Petitioner's Application For IPM In Bosnia

Petitioner applied with DynCorp for the IPM position in Bosnia in spring 1996. Petitioner understood throughout the application process that he would have to pass a physical examination before he could be finally selected for the IPM position. Opp. App. 2.

On or about August 12, 1996, DynCorp informed Petitioner that he had been conditionally accepted for the IPM position in Bosnia, and that he would be receiving forms, including a physical examination form, to be completed before he was hired.[1] Opp. App. 3, 19. Petitioner thereafter received from DynCorp information regarding the IPM position, including a Foreign Service Employment Agreement ("FSEA") and a medical examination form. Opp. App. 19-22. Petitioner also received a letter advising that the

---

[1] Petitioner's assertion that DynCorp notified him on August 12, 1996 "that he had been selected for the position of IPM", Pet. 6, is misleading because, as noted above, DynCorp advised Petitioner that his employment was conditioned upon the successful completion of the medical exam. *See* Opp. App. at 3, 19, 21.

employment offer described in the FSEA was contingent on satisfactory results of, among other things, a pre-employment medical examination. Opp. App. 21.

Petitioner's physician, Dr. Mark Vickers, examined Petitioner and completed the requisite pages of the physical examination form. Petitioner shared with Dr. Vickers his understanding of the duties and responsibilities of an IPM in Bosnia, and Dr. Vickers did not express any concern regarding Petitioner's ability to meet the requirements of the job. On the examination form, Dr. Vickers classified Petitioner as "[f]it for all physical and manual duties."

5. DynCorp's Review Of Petitioner's Application

At the time Petitioner applied, DynCorp forwarded the medical examination forms of all IPM applicants to Dr. Peter McDougall. DynCorp had entered into an agreement whereby Dr. McDougall reviewed each medical examination form completed and returned to DynCorp by the applicants' physicians. Opp. App. 24. DynCorp provided to Dr. McDougall a summary of the responsibilities and tasks associated with the IPM position and a description of the conditions in Bosnia under which the IPMs could be performing those tasks, and he considered the job requirements and the conditions in Bosnia when determining whether an applicant could perform the job. Opp. App. 13-14, 25-28. DynCorp secured a review of the medical exams to ensure that IPMs would be physically able to perform the tasks required of an IPM in Bosnia. Opp. App. 13.

After examining Petitioner's medical examination form, Dr. McDougall wrote a note to DynCorp in which he stated: "Overweight smoker on two hypertensive meds. Wouldn't recommend for strenuous work."[2] Opp. App. 29. Upon receiving this note, Austin Bryan, a DynCorp recruiter, notified Petitioner on or about September 6, 1996 that he should stop making preparations to go to Bosnia until a final decision was reached regarding his application. Mr. Bryan explained to Mr. Stumbo that a physician had reviewed his medical records and advised that he may not be medically suited for the job environment in Bosnia. Opp. App. 30.

After reviewing further Petitioner's application, the medical examination performed by Dr. Vickers, and the comments by Dr. McDougall, DynCorp determined that the combination of Petitioner's weight, smoking and hypertension raised questions about his abilities to perform the duties of an IPM in Bosnia.[3] Opp. App. 17. Petitioner thereafter was informed that

---

[2] This evidence contradicts Petitioner's assertion, Pet. 8, that Dr. McDougall advised DynCorp that Petitioner "was medically incapable of performing" the IPM job, and that "he perceived [Petitioner] as medically incapable of performing the job."

[3] Contrary to Petitioner's claim, Pet. 6, the record contains no evidence that "DynCorp found [Petitioner] to be medically incapable of performing the position of IPM in Bosnia" or that "DynCorp withdrew the offer of IPM" only because Petitioner's medical documents revealed that he had hypertension. Similarly, Petitioner's contentions at Pet. 7 that DynCorp "perceived [him] to be substantially limited in his ability to perform the duties of an IPM because of a perceived impairment" and that the company "placed [him] in the category of an individual who did not meet the job requirements of an IPM because of his hypertension" are also without foundation in the record.

he would not be hired as an IPM in Bosnia. Petitioner never asked DynCorp for any kind of an accommodation for a disability, and DynCorp never informed Petitioner that it would not provide one.

6. DynCorp's Invitations to Petitioner To Apply For Other Similar Positions

Within a few weeks after he had been rejected for the IPM position in Bosnia, Petitioner called DynCorp to inquire whether other jobs for which he might be qualified were available. The DynCorp recruiter with whom he spoke replied that she would check to see if there were such openings and she asked him to call back. Opp. App. 4-5. Another DynCorp employee later informed Petitioner that he should reapply for the Bosnia IPM position. Opp. App. 5. DynCorp also discussed with Petitioner the possibility of his applying for an IPM job in Haiti, a position that required employees to speak fluent French or Creole. Opp. App. 5-7.

ARGUMENT

The lower courts' decisions were based upon two factual findings. The first, that Petitioner's hypertension does not limit him in any major life activity, was the basis for the legal conclusion that he was not "disabled" within the meaning of § 12102(2)(A) of the Act. The second factual finding was that the undisputed facts established that DynCorp regarded Petitioner as unable to perform one job only, the IPM position in Bosnia. To these facts, the courts below applied the legal standards adopted by this Court and adhered to by the circuit courts.

Because the Petition raises no legal issues that this Court has not previously addressed, the Court should deny Petitioner's request that it revisit the factual determinations made by the district court and the Fourth Circuit.

1. Certiorari Is Not Warranted On Petitioner's Claim Under § 12102(2)(A) Of The ADA Because This Court Has Already Addressed The Very Legal And Factual Issues Presented.

Petitioner claims he is "disabled" as that term is defined under § 12102(2)(A) of the ADA. In order to establish that he is disabled under that provision, he must establish that he has a "physical or mental impairment" that "substantially limits" him in one or more of his "major life activities". *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998); *accord Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 122 S. Ct. 681, 689 (2002) ("Merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity."). Assuming *arguendo* that Petitioner has identified a physical impairment (hypertension) that affects a major life activity (working),[4] the lower courts nonetheless correctly held that he cannot show that this

---

[4] This Court has recognized "the conceptual difficulties inherent in the argument that working could be a major life activity," *Toyota Motor Mfg.*, 122 S. Ct. at 692, and has expressed doubts as to whether "working" is an appropriate major life activity under the ADA. *See Sutton*, 527 U.S. at 492. DynCorp submits that working, generally stated, should not be considered a major life activity under the ADA and requests that the Court consider this issue if the Petition is granted.

impairment served as "substantial limitation" on his major life activity of working because his hypertension is fully treatable with medication and does not limit him in any activity. As explained below, Petitioner's argument thus is governed by and flatly contrary to this Court's holding in *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521 (1999).

In determining whether an individual's impairment "substantially limits" a major life activity, this Court has held that his ability to mitigate, or successfully cope with, the effects of the disability must be taken into account. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999); *Murphy*, 527 U.S. at 521. The undisputed facts, including repeated representations by Petitioner and his physician, establish that Petitioner's hypertension is well controlled with medication. *See, e.g.*, Pet. 5 ("[a]lthough his physical impairment, hypertension, continues to be successfully treated with prescription medication . . . .") and 14 ("[w]hile Mr. Stumbo has been able to control his hypertension with medication . . . ."). The record, moreover, is replete with facts and Petitioner's admissions that his hypertension does not limit him in any way, including in his ability to perform any major life activity. *See* Opp. App. 8-9 ("Q: Is there any activity that you're incapable of doing because of your high blood pressure? A: That I'm incapable of doing? No, not that I know of, no. Q: Is there any - does your high blood - blood pressure limit you from engaging in any kind of activity in any way? A: No.").

The speciousness of Petitioner's request that this Court review the lower courts' determination that his "well-controlled" hypertension does not render

him "disabled" under § 12102(2)(A) is reflected by the fact that this Court already specifically addressed whether an individual whose hypertension is controlled by medication is "disabled" under § 12102(2)(A) in *Murphy*. In that case, the plaintiff's mechanic job required him to drive commercial vehicles. He was fired because his employer believed his high blood pressure would preclude him from obtaining a Department of Transportation health certification, which is required for drivers of commercial vehicles. 527 U.S. at 519-20. This Court upheld the dismissal of Murphy's § 12102(2)(A) claim, holding that because his hypertension, when treated with medication, did not limit him in any major life activity, he was not disabled under § 12102(2)(A) as a matter of law. *Id.* at 521.

Relying on *Murphy*, the district court – not surprisingly given that the undisputed facts related to Petitioner's hypertension were virtually identical to those in *Murphy* – concluded that Petitioner was not disabled under § 12102(2)(A).[5] The courts below clearly applied the appropriate legal standard adopted by this Court.

---

[5] Contrary to Petitioner's contention, *see* Pet. 15, DynCorp did not argue below – and it does not contend now – that hypertension treated with medication can never be a "disability" under the Supreme Court's holdings in *Sutton* and *Murphy*. Nor did the lower courts adopt a *per se* classification that persons whose hypertension is medicated will never be "disabled" under the ADA, as Petitioner asserts at Pet. 24. Rather, as explained above, the Court's rulings in these cases confirm only that persons like Petitioner, whose hypertension is controlled by medication *and* who suffer no substantial limitation in any major life activity as a result of their controlled hypertension, are not "disabled" under § 12102(2)(A). *E.g., Sutton* 527 U.S. at 488; *Murphy*, 527 U.S. at 521.

Given the inescapable conclusion that his controlled hypertension does not substantially limit him in any manner, Petitioner asks the Court to speculate that he would, in fact, suffer from substantial limitations if his hypertension medication were unavailable to him. *See* Pet. at 16 ("it is important to consider Stumbo's hypertensive condition in totality - with and without medication - in determining whether he qualifies as disabled"). Petitioner's conjecture regarding his condition in an unmedicated state is also flatly contrary to existing Supreme Court precedent.

In *Sutton*, this Court expressly considered the issue Petitioner poses - *i.e.*, whether Petitioner's hypertension must be examined in an unmedicated state, Pet. 16 - and answered in the negative. In fact, in *Sutton*, this Court stated that evaluating plaintiffs "in their hypothetical uncorrected state - is an impermissible interpretation of the ADA." 527 U.S. at 482. This binding authority forecloses Petitioner's invitation to the Court to engage in speculation by considering his hypertension in its unmedicated state.

Finally, Petitioner's assertion that the district court erred by not "consider[ing] the specific factual issues of this particular case", Pet. 16, is belied by that court's observation that record conclusively established that Petitioner's "hypertension is fully correctable; he is not precluded from any of life's major activities, not even working."[6] Pet. App. 9. This factual

---

[6] Indeed, Petitioner's claim that the district court "wholly adopted DynCorp's assertion of the facts and totally dismissed the facts" presented by Petitioner, Pet. 5, is blatantly false. The district court properly looked to the undisputed evidence in the record as the basis for its decision.

determination is not subject to further review, lest the Court sit as a court of error correction. *E.g.*, *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980) (declining to review factual findings "[i]n view of [the Court's] settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred").

2. Petitioner's Assertion That The Position Of International Police Monitor Is A "Class Of Jobs" Contravenes The Applicable Legal Standard Identified By This Court In *Sutton* And *Murphy*.

Petitioner further asserts that the lower courts erred when they applied the legal standards adopted in *Sutton* and *Murphy* to the record facts and concluded that Petitioner had not established that DynCorp "regarded" him as unable to perform the major life activities of working because he had not shown that DynCorp perceived him to be unable to perform a broad range or class of jobs. Pet. 23. The district court and the Fourth Circuit, however, appropriately applied the expansive view of a "class of jobs" advocated by this Court in *Sutton* and *Murphy* to the undisputed facts. Their determination that Petitioner is not "regarded as disabled" under § 12102(2)(C) thus must stand.

"[A] person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities." *Murphy*, 527 U.S. at 521-22 (citing *Sutton*,

527 U.S. at 489). Petitioner claims DynCorp "regarded" his hypertension as substantially limiting him in the major life activity of "working". Addressing similar assertions in *Sutton* and *Murphy*, this Court held that a plaintiff alleging that an employer "regarded" his ability to work as "substantially limited" must show that the employer perceived him as "'significantly restricted in the ability to perform either a *class of jobs* or a *broad range of jobs in various classes* as compared to the average person having comparable training, skills and abilities.'" *Sutton*, 527 U.S. at 491 (*quoting* 29 C.F.R. § 1603.2(j)(3)(i)) (emphasis added). "[T]o be regarded as substantially limited in the major life activity of working, one must be *regarded as precluded from more than a particular job.*" *Murphy*, 527 U.S. at 523 (emphasis added).[7]

In this regard, *Sutton* and *Murphy* again are instructive. In *Sutton*, the plaintiffs, who suffered from severe myopia, alleged that United Airlines perceived their myopia as disqualifying only for global pilot positions, a singular job. This Court therefore held that the plaintiffs had failed to allege that United Airlines regarded them as unable to perform a "class of employment." 527 U.S. at 493. The plaintiff in *Murphy* was fired because UPS believed his high blood pressure would prevent him from obtaining a Department of Transportation certification required for driving commercial vehicles. This Court rejected the plaintiff's "regarded as" disabled claim, holding that UPS's knowledge of Murphy's high blood pressure and its conclusion that he was unable to perform the

---

[7] Citing 29 C.F.R. § 1630.2(j)(3)(i) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.").

particular job of driving a commercial vehicle was "insufficient, as a matter of law, to prove that [Murphy] is regarded as substantially limited in the major life activity of working." 527 U.S. at 525.

The decision in *Bridges v. City of Bossier*, 92 F.3d 329, 333-34 (5th Cir. 1996), upon which Petitioner relies, also bolsters DynCorp's position. In *Bridges*, the defendant perceived the plaintiff to be unable to perform any job in which he would be routinely exposed to extreme trauma. The court thus determined that, to show that the defendant "regarded" him as substantially limited in the major life activity of working, the plaintiff had to produce evidence from the record that showed how many and which jobs involved the routine exposure to extreme trauma. *Id.* at 333. The plaintiff in *Bridges* failed to make the requisite factual showing.[8] *Id.*

The lower courts correctly applied the foregoing analysis to the undisputed facts. The record is clear that DynCorp considered Petitioner's hypertension only insofar as it, in combination with his smoking and weight, raised doubts about his ability to perform the tasks of a specific job, International Police Monitor, in a

---

[8] Another decision Petitioner relies on is *Coleman v. Southern Pacific Transportation Co.*, 997 F. Supp. 1197 (D. Ariz. 1998), which also applies the same legal standard. (Indeed, Petitioner does not cite any circuit court that has not applied this standard since the decisions in *Sutton* and *Murphy*.) Because the plaintiff in *Coleman* produced abundant evidence showing that the defendant *actually considered* his condition to limit him from working in an entire class of transportation jobs, the court held that he had produced proof creating a genuine issue of fact as to whether the defendant perceived him as substantially limited in the major life activity of working. *Id.* at 1206.

specific location, Bosnia. *See* Opp. App. 17. Central to DynCorp's determination about the potential limitations of Petitioner's overall medical condition was the fact that he would have to perform the job in the war-torn country of Bosnia, which had severe geological and weather conditions and unreliable electricity, transportation and medical services.[9] Here, proof that DynCorp even thought about whether Petitioner's hypertension limited his ability to perform any job other than IPM in Bosnia is wholly absent from the record. DynCorp's consideration of Petitioner thus was undisputedly limited to the narrow and unique requirements of the IPM position in Bosnia. *See* Opp. App. 15-16. Petitioner's bald allegations that DynCorp determined him to be unable to perform an IMP's duties anywhere, Pet. 7, 13-14, and to be "'substantially limited' in his ability to perform duties as law enforcement and logistics personnel, Pet. 16, lack any record support. The facts thus fall far short of establishing that DynCorp believed Petitioner to be substantially limited in his ability to perform a class of jobs or broad range of jobs.

Lacking any record evidence that DynCorp considered him unable to perform the broad range or class of jobs relevant here, *i.e.*, national and international law enforcement and security, Petitioner asks this Court conclude that the job of International Police Monitor – in and of itself – comprises a "class of

---

[9] In this regard, the record reflects that Petitioner's representation that DynCorp determined that he did not meet the requirements of an IPM solely "because of his hypertension", Pet. 7, is incorrect.

employment." Pet. 13. This argument is wholly unsupported by the governing regulations cited in *Sutton* and *Murphy*, which state that factors to consider in determining whether one is substantially limited in his ability to work include "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within [the] geographic area [reasonably accessible to the individual], from which the individual is also disqualified." 29 C.F.R. § 1630.2(j)(3)(ii)(B). "If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different jobs are available, one is not precluded from a broad range of jobs." *Sutton*, 527 U.S. at 492. Petitioner's training, knowledge, skills and abilities readily enable him to perform any number of jobs in the law enforcement and security field, including the job of security coordinator in Algeria, which he has held since 1997. Because Petitioner does not and cannot show that other jobs "utilizing [his] skills" are not available to him, his "regarded as" claim fails.

Having developed no evidence that DynCorp regarded him as unable to perform any police monitoring, law enforcement or security job other than the IPM job in Bosnia, Petitioner raises several unfounded arguments - and in so doing, misrepresents the facts in the record - in hopes of salvaging his "regarded as disabled" claim. First, he baldly claims that DynCorp "perceived" that he

> was medically incapable of performing major life activities required of IPMs such as, but not limited to, walking, running, lifting, climbing stairs, personal survival skills, ability to adapt to cold weather and defense of his personal safety. DynCorp believed that Mr. Stumbo was medically incapable of performing the broad range of jobs which include any non-sedentary activity such as walking, running, climbing stairs or any form of physical exertion.

Pet. 8. There are absolutely no facts in the record that DynCorp actually "perceived" any of the foregoing. Nor is there record evidence supporting Petitioner's assertions that Dr. McDougall "advised DynCorp that Mr. Stumbo was medically incapable of performing the job" of an IPM, Pet. 8; that DynCorp had "internal procedures" requiring either an independent review of Petitioner or a "follow-up by the candidate's own doctor", Pet. 18; or that "it is undisputed that [Petitioner] has the requisite skills and experience" to perform as an IPM, regardless of the location, if he had access to his medication. Pet. 18-19.

Second, Petitioner claims not only that DynCorp decided that he was unfit for the IPM job in Bosnia, but also that "DynCorp concluded that [his] impairment (with or without hypertensive medication) precluded him from obtaining any positions with DynCorp", Pet. 20 (emphasis in original); that DynCorp's decision not to hire him as an IPM in Bosnia "barred him . . . from all possible positions including Bosnia", *id.*; and that "DynCorp refused to consider [Petitioner] for any IPM

positions whether in Bosnia, Haiti or elsewhere". Pet. at 19. Petitioner does not and cannot provide record citations supporting these wholly speculative assertions. Indeed, the record facts suggest the opposite, as reflected by Petitioner's admission that, after denying him the IPM position in Bosnia, DynCorp invited him to seek other positions with the Company.[10] *See, e.g., Hooven-Lewis v. Caldera*, 249 F.3d 259 (4th Cir. 2001) (defendant did not regard plaintiff as unable to perform the life activity of working where it sought to place plaintiff in another position).

Accordingly, Petitioner's unsupported *allegation* that DynCorp's perception of his impairment would have restricted him from "all IPM and related positions", Pet. 23, is meritless. In the lower court, Petitioner failed to establish what those "related positions" were, what their responsibilities included, and where and under what conditions they were to be performed. The Fourth Circuit thus correctly upheld the district court's factual determination that Petitioner "demonstrated only that Defendants considered him unfit for one particular job", Pet. App. 2, 10, a finding that, under the legal standards expressed in *Sutton* and *Murphy*, precludes Petitioner's recovery on his "regarded as" disabled claims. Accordingly, review by this Court is unwarranted.

---

[10] Petitioner testified that, after DynCorp denied him employment as an IPM in Bosnia, it extended him opportunities to apply for similar positions in other locations. Opp. App. 4-7. He also represented in a letter to Senator John Warner that DynCorp invited him to reapply for the Bosnia position or apply for other positions after he was denied the Bosnia IPM job. Opp. App. 32. These concessions flatly contradict the notion that DynCorp somehow perceived Petitioner to be limited in his ability to perform jobs other than the IPM job in Bosnia.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: February 11, 2001 Respectfully submitted,

Michelle Bodley Radcliffe
Counsel of Record
Steven W. Ray
Edward Lee Isler
RAY & ISLER, P.C.
8245 Boone Boulevard
Suite 402
Vienna, Virginia 22182
(703) 748-2690

TABLE OF CONTENTS
Appendix to Brief

Page

Excerpts from Joint Appendix
filed May 2, 2001:

Excerpts from Exhibits to
Defendants' Memorandum of Points and
Authorities in Support of Defendants'
Motion for Summary Judgment,
filed January 2, 2001:

Exhibits:

1. Excerpts from Deposition of
Richard M. Stumbo
taken November 6, 2000 ..... App. 1

2. Excerpts from Plaintiff's Answers
and Objections to Defendant's
First Set of Interrogatories
undated ..... App. 10

4. Excerpts from Oral Deposition of
Austin Bryan
taken December 7, 2000 ..... App. 12

8. Excerpt from Letter to
Richard M. Stumbo from
William E. Marcantel,
Director of Operations
Re: IPM Contract
dated August 12, 1996 ..... App. 19

Exhibits, continued:

11. Excerpts from Deposition of
Peter McDougall
taken December 7, 2000.....App. 23

12. Handwritten Notes
of Peter McDougalll
Re: Richard M. Stumbo
dated July 6, 1996.....App. 29

13. Typewritten Notes of
Austin Bryan
Re: Richard M. Stumbo
undated.....App. 30

Excerpts from Exhibits to
Defendants' Reply Memorandum of Points and
Authorities in Further Support of
Motion for Summary Judgment,
filed January 17, 2001:

3. Excerpt from Letter to
The Honorable John Warner from
Richard M. Stumbo
Re: Dyncorp Aerospace, Inc.
dated December 18, 1997 .....App. 31

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

RICHARD M. STUMBO,
Plaintiff,

vs.

DYNCORP PROCUREMENT SYSTEMS, INC.,
DYNCORP AEROSPACE, INC.,
DYNCORP AEROSPACE OPERATIONS, INC.,
and
DYNCORP AEROSPACE OPERATIONS
(U.K.), LTD.,
Defendants.

CIVIL ACTION NO. 5:00CV00007

Vienna, Virginia
Monday, November 6, 2000

Deposition of

RICHARD M. STUMBO

called for examination by counsel for the defendants, pursuant to notice, in the offices of Ray & Isler, 8245 Boone Boulevard, Suite 402, Vienna, Virginia 22182, commencing at 9:55 o'clock, a.m., before Richard Gordon, court reporter and Notary Public for the Commonwealth of Virginia, when were present on behalf of the respective parties:
Reported by: Richard Gordon

* * *

wouldn't tell me to call back every week. You know, I figured if there was something that they didn't - - that would disqualify me, that they would tell me not to call back because of whatever the reason might be.

Q. And at the time when you were having these conversations with Mr. Bryant, you understood that you would have to pass a physical at some point?

A. Yes.

Q. So to the extent that was still out there, you had not met that qualification yet?

A. No, I hadn't.

Q. Do you recall the names of anyone else that you spoke with at DynCorp up through August of 1996?

A. Yes, a Kristen - - I think her married name is Messer, M-E-S-S-E-R.

Q. When did you speak with Ms. Messer?

A. Most of the times when I called on the weekly basis, I was talking to her.

Q. Can you tell me how many times, approximately, you talked to Mr. Bryant during

* * *

* * *

A. Yes. They said it would be a contract, a physical, an information, information on actually what the job is, as far as what's expected of you, you know, and items they would issue to you, items they recommended you to take, that you had to purchase on your own, and also the kind of sequence of events.

In other words, you go to New York, you get the plane, you go to Zagreb, Croatia. And there you get a briefing on what you're to do, you know, get an assignment. Kind of a chronology of what was going to take place, you know.

Q. And you understood, at the end of those conversations on the 12th, that the offer you had been given was a conditional offer, subject to you completing the necessary paperwork and exams and forwarding that information back to DynCorp?

A. Right; yes.

Q. In this lawsuit you have alleged that DynCorp discriminated against you on the basis of a disability or perceived disability. Is it your contention that DynCorp discriminated against you

* * *

* * *

other jobs?

A. It wasn't - - it wasn't long. In other words, I don't remember exactly what date it was, but it may have been right after everybody left to go to Bosnia, because I went to the airport with them that day.

And I think, whatever date that was, September something, but they - - I had called and asked about other jobs. Okay, if I didn't qualify for this job, were there other jobs that I qualified for?

By this time I'm finding out a little bit about - - that DynCorp is a pretty big company. And I didn't realize that in the beginning. So I called and asked about other jobs, if there were any.

Q. Who did you call?

A. I remember talking to Lynn Holland then, because I hadn't talked to her in a long time. And I called and asked for Kristen, and she wasn't there. And I think I asked for Austin Bryant, too, and he wasn't there. And Lynn Holland was there. I remembered her from way back in the beginning. So - -

Q. What specifically did you ask Ms. Holland?

A. I told her about getting dropped from the Bosnia job because of the high blood pressure. And I asked her if there was any other jobs available with DynCorp. And I don't really remember her response, except that, you know, she said that DynCorp is a big company, and there may be other jobs. But for this project, it was, you know - - there was different projects going on.

I guess what I was asking her is, if there's another project going on, can you direct me there, a number or a person to call or something like that. So she was going to check on that for me. So I was, you know, basically - - I had to call back later.

Q. Okay. When you talked with Ms. Holland about other projects, what was the nature of those projects?

A. Well, I didn't know the nature. I was trying to find out what the nature was. You know, some projects may be projects I would not

* * *

Q. And did she ever get back to you about what, if any, other overseas jobs in a similar area there were?

A. No, because when I called again, she wasn't there. It was Kristen was there again. She talked to me about - - I'm not sure if it was that time or another time even - - about the Haiti job coming up. But I think it was a little early for that yet. But there was other things coming up, but nothing was real firm yet, nothing was definite. And then Kristen told me to reapply for the Bosnian job.

Q. Okay. So you are not sure at that time that Kristen talked about Haiti, because - -

A. I think it might have been another call or two after that call.

Q. Okay. But she said that other things might be coming up, but we are not certain. In other countries?

A. Yes. They had other contracts they were working on, but they didn't - - you know, they weren't finalized yet, and that I should keep my name in, if I was still interested, keep my name in there because things came up all the time.

And then she told me, "Well, why don't you just reapply for the Bosnia job? Because they still have openings."

Q. And what was your response when she asked you to reapply for Bosnia?

A. I was very surprised when she told me that. Why would I reapply when I just got turned down for it? I'd just get turned down again.

Q. Did you ask her that?

A. And she said, "Well, maybe this time you won't," or some words to that effect.

Q. What else did she tell you about there still being Bosnia openings?

A. I can't really remember anything else that we talked about. I just was very surprised about her saying that, that I should reapply. That wasn't even - - I didn't even ask her, "Hey, should I reapply?" Because I had put that aside. I thought that was done.

Q. When she said that, did you ask her, why would I reapply when I just got turned down?

* * *

sorry - - to Mr. Marcantel before or after you had been told you no longer met the requirements, that there had been this change in requirements?

(Pause.)

A. I think it was after, but I'm not positive. I think it was - - I'm - - I'm not real sure.

Q. Okay. And aside from sending a letter to Mr. Marcantel - -

A. Yes.

Q. - - after you were told you now r eded to be out of the service only five years to qualify as an international police monitor, did you have any other conversations with anyone from DynCorp about, "Is there another job you have that I can apply for", or "I want to apply for another job"?

A. Yes. I called somebody about - - later about the - - about the Haiti job, too, but I think there it was the same requirement, five years, which disqualified me right away even from applying. And also, they were, of course, looking for, you know, Creole or French speaking,

* * *

of that allegation, as I understood it, is high blood pressure. Am I correct that's your claim?

A. Yes.

(Pause.)

Q. Is it correct that your high blood pressure does not preclude you from performing the duties of a police monitor now, in your current job?

A. Well, my - - it's not a police monitor that I'm doing, but it's a similar - - yes, it's similar duties.

Q. Okay.

A. No, it doesn't prevent me from doing my job.

Q. Okay. And is the reason that your high blood pressure doesn't prevent you from doing your duties in that job because you're taking medication for it?

A. Yes.

Q. So the medications keep your high blood pressure at a level that allows you to perform the functions of your job?

A. That is correct.

Q. Okay. And is it your allegation that your medication would have allowed you to perform the duties of an international police monitor for DynCorp at an acceptable level?

A. Yes, it is.

Q. In response to interrogatory 12, and you can look at it if you want - - let's see what page it is.

A. Page nine, I think.

Q. Here we go. Nine, and continuing over to the top of page 10 that you make the contention there that, " I have had no physical limitation as a result of my high blood pressure." Is that an accurate statement?

A. Yes. I've never had any limitations.

Q. Is there any activity that you're incapable of doing because of your high blood pressure?

A. That I'm incapable of doing? No, not that I know of, no.

Q. Is there any - - does your high blood - - blood pressure limit you from engaging in any kind of activity in any way?

(Pause.)

A. No. I - - I guess I don't understand - -

Q. I - - I understand that you don't know the whole universe of - - of questions - - but on a

A. No, what I'm - - what I'm thinking about is does it limit me in - - in - - in what I can do, or - -

Q. On a day-to-day basis, does it limit you - -

A. On a day-to-day basis, no.

Q. Okay.

(Pause.)

You've mentioned several friends that have worked or work for DynCorp. Have you talked with any of them about your claims against DynCorp.

A. Let me think here.

MS. CRENSHAW: Current or - - or past?

BY MS. BODLEY:

Q. Current or past, either one?

A. Yes, I've talked to Steve Mann and Gary

* * *

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

RICHARD M. STUMBO
Plaintiff,

v.

DYNCORP PROCUREMENT SYSTEMS, INC.,
DYNCORP AEROSPACE, INC.
DYNCORP AEROSPACE OPERATIONS, INC.

and

DYNCORP AEROSPACE OPERATIONS
(U.K.), LTD
Defendants.

PLAINTIFF'S ANSWERS AND OBJECTIONS TO DEFENDANTS' FIRST SET OF INTERROGATORIES

COMES NOW the Plaintiff, Richard M. Stumbo, by counsel, and for his Answers and Objections to Defendants' First Set of Interrogatories states as follows:

* * *

12. If you claim that, at the time you applied with DynCorp for the police monitor position, you had high blood pressure and/or hypertension, describe in detail the nature of the your high blood pressure and/or hypertension, including but not limited to the length of

time during which you have had high blood pressure and/or hypertension, whether the high blood pressure and/or hypertension has been constant or temporary, the effects (physical, physiological, mental, etc.) caused by the high blood pressure and/or hypertension, the name and dosage level of medications you have taken to treat the high blood pressure and/or hypertension, the time period during which you took each such medication, the effect (physical, physiological, mental, etc.) of any such medications, the names of all doctors who have treated your high blood pressure and/or hypertension, the names of all doctors who prescribed medication for your high blood pressure and/or hypertension, and whether you have been precluded from or limited in any activity - including, but not limited to, functions such as caring for yourself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working - as a result of the fact that you have high blood pressure and/or hypertension.

ANSWER: In 1991, I went to the doctor for a sinus headache. Upon examination, I was diagnosed as having hypertension. It has been treated with medication without incident. My medical records are produced with my Responses to First Request for Production of Documents.

I have had no physical limitations as a result of my high blood pressure.

Plaintiff reserves the right to seasonably supplement this Answer to Interrogatory.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

RICHARD M. STUMBO,
Plaintiff,

vs.

DYNCORP PROCUREMENT SYSTEMS, INC.,
DYNCORP AEROSPACE, INC.,
DYNCORP AEROSPACE OPERATIONS, INC.,
and
DYNCORP AEROSPACE OPERATIONS (U.K.), LTD.,
Defendants.

CIVIL ACTION NO. 5:00CV00007

****

ORAL DEPOSITION OF AUSTIN BRYAN

****

December 7, 2000 Fort Worth, Texas

April L. Stuck

* * *

physician. Is he engaged for the sole purpose of reviewing forms or does he actually treat people that work here?

A. His role was solely to review these forms and give an opinion on what was on the form.

Q. Did he give or was - - strike that. Was he given criteria to follow as he was reviewing or was it just purely at his discretion?

A. Well - - and I think I'm the one that absolutely - - I'm confident I was the one that told him, based on the information that I had been given as to the conditions in the theater, what the people would be expected to meet, the criteria, in other words, the working conditions, in other words, and that I - - I told him that the people needed to be medically qualified to do a number of different tasks, to be able to sustain themselves and in a really individualistic type way. In other words, they would have minimal support. By that I mean they would have to go out and find their own place to live, cook their own food or go find food.

At that time, you recall, it was a war area. Our people were turned over to the United Nations and became a part of a United Nations workforce that was then assigned organizationally to the various police departments. And we told - - I told the doctor, Here are the conditions as they are - - have been described to me.

I tell you, I was never there. I have not been there since. I have no way of knowing whether the conditions are as bad as they were described to me. But

they required someone that was fairly independent to move quickly. By that I mean they were still being fired at. It was a dangerous, hazardous situation.

So the physical aspects of this was a very important point that was made to us by the Department of State.

Q. Did you convey this to Dr. McDougall in a memo or did you just call him and say, Doctor - -

A. No.

Q. Let me finish. I'm going to give you a pile of documents, and I want you to evaluate them in light of the following. And you just relayed it to him.

How did you get that message to him?

A. I went to his office, and I took the copy of the physical forms that we would send out to the individuals. And I showed him what I would be bringing him. I told him what we were looking for verbally. I outlined that in as much detail and answered his questions as to what we wanted him to do and why we wanted him to do it. I explained all of that to him.

And during that conversation my recollection was that he asked me questions. I responded to those, those questions, and further defined what those - - what we wanted him to do.

Q. To your knowledge, had he ever done any work for like this for DynCorp before?

A. I have no idea.

Q. How did you select him to do this task?

A. I simply - - I called him. I had occasion to use him as a personal doctor. And I called him and said, Would you do this. He's my personal physician now.

I've had him as a personal physician since about that time. I heard about him through some friends and went to him. And oh, it was probably shortly after I went back to work that I went to him and asked him if he would do this.

Q. To your knowledge, is he still doing this for DynCorp?

A. Yes, sir, he is.

Q. Did you show him on the forms certain

* * *

A. Yes, sir.

Q. And as a result of that, the doctor or, again, someone in his staff, classified the person. And you've talked about the classifications. I think there was what one, two and three or A, B and C, something to that effect?

A. One, two and three.

Q. And you-all relied on that classification?

A. Yes, sir.

Q. Now, you went through the criteria that you talked with Dr. McDougall about orally, and one was number of tasks is what I wrote down.

Do you mean working long hours or how did you explain that to him?

A. I'm not absolutely certain what detail I went into with him. But I did want him to understand that we had had complaints from the State Department, from the United Nations, about the medical condition of some of our personnel. We had people that were unable to walk up flights of stairs, that could not conduct foot patrols.

There were instances where the people were in jeopardy simply because we could not move quickly because their limbs or - - you know, they were either arthritic - - I say arthritic. Perhaps the wrong term. Stiff, had difficulty moving.

What I tried to describe to him was the fact that it was absolutely essential that these people had good health and were able to do the mission that we were asked to do and contracted to do. Our job was to provide people that could do those jobs without any impairment or any loss of capability.

Q. You said you'd received complaints from the government. Was that at this particular or for this particular job in Bosnia?

A. Yes, sir.

Q. They were complaining because the recruits from earlier, the IPM recruits, were unable to do some of the physical tasks that they were called upon to do?

A. That's correct. Some were unable to perform or performed minimally.

Q. And what happened to those people, those people that couldn't walk upstairs or pull foot patrols or pull long hours?

A. I'm not certain what happened to them. Some of them quit. Some of them were medically evacuated. Some of them remained in place and were given other - - less duties. I don't remember if any

* * *

Q. Did you all work off of some chart though that said if you're six feet, you can be in this range and not be overweight or things of that sort.

A. We relied on what the doctor would tell us. If he said he was overweight, then we assumed that the doctor knew what that chart was for his height, age. And that's one of the things that doctors do for you. They tell you he's overweight. There's some standard that's a medical standard.

Q. So then it was the combination of being, according to this report, overweight, a smoker and on these medications that caused you-all to - - the team to say, We're not going to hire this gentleman?

A. Yes, sir.

Q. Was there any one criteria that stood out?

A. No. I don't think so. I think, as I mentioned earlier, that we tried to look at the whole guy. And I have to tell you that we were doing everything we could to get people that were qualified to avoid the risk of having somebody that was not qualified get over there. We wanted people that could do the job.

The job performance was one of the principal elements that we looked at. Can he do it. And when the doctor says that he's not recommended, then that carries a lot of weight.

Q. Did anyone else other than the team participate in this one?

A. My recollection was that we showed this - - I personally took the file, showed this to Mr. Joe Estill. Because I showed him what I was - - what - - you know, the statement that I read to Rick over the telephone. I personally called him and read that statement to him, after it was approved by Mr. Joe Estill.

Q. Who was Joe Estill?

A. He's our vice-president in charge of human resources.

Q. Is he still here?

A. Yes, sir.

Q. He gave you a statement that you can read to Mr. Stumbo?

A. He approved the statements that we had, yes, sir.

Q. Did he have to approve statements given to all people that were not hired?

A. I don't know about all. That's awful encompassing. I don't know that. I know in this case that since I was the one that was going to call Mr. Stumbo, I wanted to be sure that what I said to

* * *

12 August 1996

Richard Stumbo
2351 Mountain Road
Front Royal, VA 22630

Dear Mr. Stumbo:

Enclosed please find materials in response to our most recent conversation with you on the Bosnia IPM contract. Please complete the requirements listed below and follow the instructions for returning the paperwork to our offices. Upon successful completion of the below listed requirements final processing will take place in New York City prior to departure for Zagreb, Croatia and then Bosnia. In order to meet the quick response time-set forth by our customer you must respond immediately to the criteria in this letter.

It is important that the day you receive this package you make arrangements to complete the below tasks within a day or two after receipt of this package. You will not be able to travel without completing these tasks. I apologize for the short turn on these items but we are required to have this information prior to arrival of any candidate in Bosnia.

First, you must complete a pre-employment drug screen and physical. Please take the enclosed Chain of Custody form to the below address for your pre-employment drug screen. This clinic has been informed of our process and should not charge you for the collection. If they do please keep your receipt and return it with the other paperwork.

Please call the clinic at the phone number listed to schedule a time for your drug screen.

Roche Labs/Labcorp
611 Jefferson Davis Hwy #A1
Fredericksburg, VA
703-373-9673 call first

The enclosed Medical Examination form should be used for your physical examination. Please make an immediate appointment with your physician and have this medical form completed. It is important that the physician complete the last page (medical classification and clearance form) of this package. If this form is not completed DynCorp cannot employ you. This medical classification and clearance form must be faxed to our offices immediately upon receipt. The fax number, 817-737-1608, is written on the medical form. Again, keep your receipt and return it with the other paperwork. Our customer is currently not paying for medical examinations but we are in negotiations with them on this matter.

* * *

Second, you must obtain 2 copies of your passport, 4 additional passport photos, and copies of your dental x-rays. This information will be used to process visas in-country and will be maintain in an in-county personal file in case of accident while in-country.

Third, you must complete the below listed forms located in your package and return them as instructed. Please print on all forms so that the information is legible.

1. Foreign Service Agreement (your contract) - read carefully and sign the signature page at the back. Copies of this agreement will be sent to Zagreb and maintained in a personal file. Returned by Federal Express.

2. Employee Profile Form - complete all blanks on this form. Return by Federal Express.

3. Employee Uniform Size inventory - complete and return by fax immediately. Return original by Federal Express.

The offer of employment described in the enclosed Foreign Service Agreement is fully contingent on satisfactory results of the Department of State screenings, Pre-employment Drug Screen and Medical Examination. It is important that you do not leave current employment, sell property, etc.. until DynCorp receives positive completion of all screenings. We will inform you upon receipt of all screening results.

Listed below is a comprehensive list of the enclosed materials and completion instructions.

1. Medical Examination Form with Medical Classification and Clearance Form (complete medical and return.

Medical Classification and Clearance Form by fax immediately). Should complete immediately upon receipt of package. Return original by Federal Express.

2. Chain of Custody Form (take to Drug Screen Facility listed above immediately upon receipt of package. Return original by Federal Express.

3. Obtain 2 copies of current passport photo's (return by Federal Express package).

4. Obtain 4 copies of passport photo's (return by Federal Express package).

5. Obtain a copy of dental x-rays (return by Federal Express package).

6. Employee Profile with every blank filled-in (return by Federal Express package).

7. Employee Uniform Size Inventory (fax to above fax number immediately).

8. Foreign Service Agreement signed (return ALL pages including signed page by Federal Express package).

Upon successful completion of your medical examination and drug screen we will contact you by phone and give instructions concerning final processing in New York.

If you have any questions concerning these materials please feel free to contact the undersigned Art Keener, or Lynn Holland at 817-737-1690, 1691, or 1693, 1569 between 0800 and 1700. We look forward to success in this process and hope to personally meet you in the near future.

Sincerely,

William E. Marcantel
Director of Operations

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

RICHARD M. STUMBO,
Plaintiff,

vs.

DYNCORP PROCUREMENT SYSTEMS, INC.,
DYNCORP AEROSPACE, INC.,
DYNCORP AEROSPACE OPERATIONS, INC.,
and
DYNCORP AEROSPACE OPERATIONS
(U.K.), LTD.,
Defendants.

CIVIL ACTION NO. 5:00CV00007

****

ORAL DEPOSITION OF PETER MCDOUGALL

****

December 7, 2000 Fort Worth, Texas

April L. Struck

* * *

have a certain condition. The HMO would sent that record and recommendation for treatment. You-all would evaluate that or is that too simple or am I off base?

A. It doesn't' work like that.

Q. Would you please explain.

A. A doctor would request to have another doctor see a patient to do a procedure, and they have to have an authorization number. And we would provide that authorization number.

Q. I see. And how are you compensated? Is it on a per review basis, hourly basis?

A. Salary.

Q. Salary?

A. Uh-huh.

Q. You also provide services for DynCorp?

A. Yes.

Q. And what do you do for them?

A. I review medical applications that they send to me.

Q. Are these any particular type of applications or just all types in terms of are they for employees of DynCorp to work in their offices here or abroad or - -

A. No. These are strictly for foreign posts

* * *

* * *

had this relationship with DynCorp? What was the first communication with you about what DynCorp would expect you to do?

A. He asked me to review medical application reports that were sent to DynCorp and to give my opinion.

Q. Opinion of what?

A. Opinion of whether medically these people would be able to be acceptable for these stated posts overseas.

Q. Did he tell you anything else?

A. He gave me a - - initially I remember he gave me about a three- or four-page memo on the circumstances that these people likely would encounter the job - - what the job entailed. It was fairly detailed as I remember.

Q. Do you remember what the circumstances were?

A. At that time the circumstances as stated in, let's say, this memo were quite vigorous. People would be in remote areas. People could be cut off from services. I mean, it was - - it was significant. Not your typical job in an established community.

I believe it also talked about having to do physical activity. And if I'm not mistaken, there as something about terrain hills, something like that. The reason that I was initially contacted, I think, any person was contacted was because this was a program that had, I believe - - at least in the Bosnia, had not been going for that long. And there was some question that some people had got there and were physically just not able to perform the job.

Q. How did you learn that?

A. Austin Bryan told me that.

Q. Did he give you examples of how they couldn't do their job?

A. People physically couldn't climb up hills. I can specifically remember that. This was stated as a fairly rigorous job.

Q. You say climb up hills. You don't mean like climbing Everest or something like that.

A. No. I believe that means that this job, to my understanding, was very much an outside observation sort of patrol - - maybe patrol - - patrol would probably be - - this was kind of walking - - the impression I got at that time, this was walking the beat in a very rugged surrounding.

Q. Did you understand that people would be sleeping out of doors for successive days such as in tents and that kind of thing?

A. I believe that was a living condition that that was possible.

Q. And you say walking. You mean like a march of sorts from one location to another over rough terrain or what did you understand?

A. No. Just that people in a - - I mean, I knew as much from reading the paper and looking at the news about Bosnia as the average citizen. And I could imagine the circumstances that people might be at for the stated job. And that's what I would use in my judgment.

Q. All right. And so I can separate them, were those things that you knew from your independent reading and watching the evening news or were these things that Mr. Bryan told you or were they contained in that memo?

A. I would say the job description was contained in the description of the job that I read.

Q. And that memo was delivered by Mr. Bryan?

A. Yes.

Q. Was there anything in the memo about certain medical conditions that should be watched or

* * *

his concern, as he relayed it, was he had people that couldn't walk up a flight of stairs. And that was a problem.

When you said walk up hills, are you relating it back to his concerns that they had hired people that couldn't walk up flights of stairs?

A. I don't know that he expressed to me the analogy of walking up stairs.

Q. All right. But in any event, when you say walking up hills and physically demanding, you're referring to what he was relaying to you about the problems with DynCorp's medical evaluation process in that prior to you coming on the scene they had had people - - I'll tell you he just gave his deposition - - that literally couldn't walk up a flight of stairs?

A. So your - - the question is.

Q. The question is, when you talk about physically demanding, those are the types of circumstances that he was describing to you, and therefore, I want you to be able to find me people or screen people that don't have problems such as the ones we're having over there right now?

A. He explained some job requirement situations they had for these postings, and I'm going to use my medical judgment to review these forms and form an opinion. And I will give DynCorp that opinion.

Q. And what I'm trying to get at - - and forgive me if you've already gone over this and maybe I didn't hear it - - but what were those conditions, those physical conditions, that these people were going to have to endure?

A. Unstable living conditions or at least not dependable, could well be not living indoors, could well be subjected to some physical hardships. Those are the types of things.

Q. Did you ever comment to Mr. Byran or anyone at DynCorp over the term that you've evaluated these applications that you'd like to see some other information or other information would be helpful to you in this process?

A. I don't think I've specifically requested an updated job description.

Q. But in addition - - well, actually, you've been provided updated job description either orally or in writing over the years?

A. Verbally.

Q. But did you ever say, You know, it would be nice if you had the examining physicians to talk

* * *

Texas Health Care

Harris Center Southwest
6100 Harris Parkway
Suite 250
Forth Worth, TX 76132
(817) 346-5111

Peter G. McDougall, M.D., CCFP, AAFP — DEA # AM7511416
Bob Lilli, M.D., AAFP
Grace Grajales, R.N., FNP-C — DEA # BL1417915

Name: Richard Stumbo
Address: _____ Date: 7/6/96

Rx
Overweight smoker on two hypertension meds. Wouldn't recommend for strenuous work.

/s/ Peter G. McDougall

Label

Refill ____ times

_____ M.D. _____ M.D.
Product selection permitted Dispense as written

Our physician has reviewed your medical records and has advised us that you may not be medically suited for the job environment in Bosnia. This is a heads-up and to recommend that you make no further preparations to go to Bosnia as an IPM. We will advise you of the final determination on Monday, September 9, 1996.

Statement agreed to and as suggested by Joe Estill, Human Resources Dept.

Delivered by /s/ Austin Bryan

Richard M. Stumbo
2381 Mountain Rd.
Front Royal, Va.
Currently Working
Algeria, Address:
Richard M. Stumbo
M.W. Kellogg
6458/DZBH
P.O. Box 4522
Houston, Tx. 77210-4522
Date 12-18-97

Honorable John Warner
225 Russell Building
Washington, D.C. 20510

Dear Senator Warner

My family and I had the pleasure of meeting you years ago at Andy & Mary Scott's Guests' Family Farm Picnic near Front Royal Virginia. Andy asked me to assist in security arrangements for the picnic. It was a pleasure working with Andy and Mary Scott at their home. I retired from the D.C. Metropolitan Police Department in August of 1990 and have worked security assignments since then. In March of 1996 I applied for a job with DynCorp Aerospace Inc. a State Department contractor supplying American Police Monitors

* * *

months later other friends of mine applied for this same job with high blood pressure and were accepted and currently serving in Bosnia. Later I called back to DynCorp talking to a secretary whom I had talked to in the past. She told me to reapply for the job because my position had been given to a friend of someone in the DynCorp office.

When I called about the job openings I was told that the positions were filled. I filed a complaint with the U.S. Equal Employment Opportunity Commission in October 1996, at the Dallas Texas Office. Ms. Olga Cardennas (phone: 214-655-3392 fax 214-655-3443) was assigned my case. A document was sent to me (enclosed) of the charges against DynCorp. In over a year I have received this document and one phone call from Ms. Cardennas. I have called many times and left a message on her telephone only to receive no reply. I would like to know the status of this case and receive some kind of update from time to time.

***